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In the Supreme Court of the State of Utah

JERRY W. McGUFFEY,

Petitioner-Respondent,

- vs -

JOHN W. TURNER, Warden, Utah
State Prison,

Respondent-Appellant.

Case No.
10561

BRIEF OF RESPONDENT

Appeal from the Judgment of Honorable Marcellus K. Snow, Judge, Granting the Petitioner a Conditional Release Upon Writ of Habeas Corpus.

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, John W. Turner, Warden of the Utah State Prison, appeals from a judgment of the District Court of the Third Judicial District, conditionally releasing the respondent, Jerry W. McGuffey, a prisoner at the Utah State Prison and ordering the respondent to be returned to the Sixth Judicial District, Kane County, to stand trial on the charge of robbery.

DISPOSITION IN LOWER COURT

Jerry W. McGuffey, on November 22, 1965 filed a Petition for a Writ of Habeas Corpus in the District Court of the Third Judicial District. The petition alleged that Jerry W. McGuffey was illegally restrained by John W. Turner. The petition further alleged that the judgment, sentence and commitment was illegal in that on September 13, 1965 the petitioner entered a plea of guilty before the Honorable Ferdinand Erickson of the Sixth Judicial District to the crime of robbery, said plea having been entered without advice of counsel, and as a result of coercion exercised against the free will and violation of the petitioner. As a result of this plea the petitioner was committed under sentence to the Utah State Prison. A hearing upon this petition was duly held before the Honorable Marcellus K. Snow, Judge of the Third Judicial District. On February 7th, 1966 the court found that the petitioner was not properly advised regarding his right to counsel and that the petitioner's plea of guilty entered on September 13, 1965 was not voluntary. The court ordered that the petitioner be released from prison and remanded to the custody of the Sheriff of Kane County, Utah for further proceedings. The order was amended to provide a stay of release for the petitioner pending appeal. On February 16, 1966 the appellant filed a Notice of Appeal to the Supreme Court of the State of Utah. A cross appeal was filed by the petitioner, February 18, 1966 contesting the amended order granting a stay of petitioner's release.

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the trial court granting the respondent's petition for a Writ of Habeas Corpus should be affirmed.

STATEMENT OF FACTS

The statement of facts set forth by the appellant is substantially correct. However, the respondent disagrees with certain statements and conclusions set forth therein. The respondent also feels that certain other material facts are omitted. First, the respondent unequivocally stated that in a conversation with Sheriff Johnson, District Attorney Ken Chamberlain, and Judge Erickson immediately prior to entering a plea of guilty, it was agreed that in exchange for a guilty plea the charge of robbery against the petitioner's wife would be dismissed and the respondent himself would be considered for probation. (R-34). Further, the respondent's wife testified that she had no doubt in her mind as a result of conversations with Sheriff Johnson and Judge Erickson, that if the respondent entered a plea of guilty she would not be prosecuted. (R-69, 70).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN RULING THAT THE RESPONDENT WAS ENTITLED TO A

WRIT OF HABEAS CORPUS SINCE THERE WAS SUFFICIENT CREDIBLE EVIDENCE BEFORE THE COURT TO SUPPORT THE COURT'S RULING.

It is clear the burden is upon a petitioner to sustain proof of the allegations contained in a Habeas Corpus petition *Application of Salisbury*, 363 P.2d 380 (1961). However, as to the degree of proof required to discharge this burden the respondent submits that a Habeas Corpus petitioner should prevail with a bare or simple preponderance of proof. The appellant urges in his brief that clear and convincing proof of the allegations in a Habeas Corpus petition should be required. Rights guaranteed to citizens through the State and Federal Constitutions should be vigilantly protected by the courts. As a result, justice dictates a necessity for watchfulness against an involuntary waiver of these fundamental constitutional rights. Every presumption should be indulged against a waiver of these rights and courts should not presume an acquiescence in their loss. *Ex Parte Cannon*, Okl., 351 P.2d 756 (1960); *Cottrell v. McLeon*, Okl., 302 P.2d 240 (1959); *Application of McDaniel*, Okl., 302 P.2d 496 (1956). Various jurisdictions have recognized a standard of proof requiring a simple preponderance. Such a standard was announced in *Ex Parte Ancheta*, 80 Cal. App. 2d 253, 181 P.2d 686 (1947).

In *Wilson v. Turner*, (208 P.2d 846 (1949)) the Kansas Supreme Court held where one is convicted of a crime and subsequently attacks the sentence and judgment un-

der which he is confined on the ground that his constitutional rights were violated, as in the instant case, he must establish the facts disclosing this violation by a preponderance of the evidence.

Earlier, the Kansas Court held in *Wilson v. Hudspeth*, 165 Kan. 666, 189 P.2d 165 (1948) that the burden on the petitioner in a Habeas Corpus action was to prove a violation of his constitutional rights by a preponderance of the evidence.

Thus, a petitioner in a Habeas Corpus action can sustain his burden of proof by a simple preponderance of the evidence. On the other hand, respondent submits that where the trial court has made a determination in a Habeas Corpus proceeding, a party seeking to overturn that decision must demonstrate to this court by clear and convincing evidence that the trial court's action was unreasonable.

This court in the case of *Scott v. Beckstead*, 13 Ut. 2d 428, 375 P.2d 767 (1962), held that on appeal from the denial of a petition for a Writ of Habeas Corpus the petitioner's case must be established by clear and convincing evidence that it would be unreasonable for the trial court to deny the petition.

Conversely, when the trial court grants a petition in a Habeas Corpus action, as in the instant case, the appellant

must assume the burden of demonstrating by clear and convincing evidence that it would be unreasonable for the trial court to grant the petition. The respondent submits the evidence not only shows the reasonable nature of the trial court's decision, but a distinct lack of the required clear and convincing proof to the contrary.

POINT 2

THE TRIAL COURT DID NOT COMMIT ERROR IN CONCLUDING THAT THE RESPONDENT WAS ENTITLED TO A WRIT OF HABEAS CORPUS SINCE THE CREDIBILITY OF THE WITNESSES AT THE HEARING IS FOR THE DETERMINATION OF THE TRIAL COURT AND SHOULD BE CONCLUSIVE ON APPEAL.

It is well established that the demeanor and credibility of a witness in a judicial proceeding are matters for the determination of the trier of the facts. Following this rule, the Supreme Court of Kansas held that where a trial court, after a full hearing on the merits of a Habeas Corpus petition, found the petitioner understandingly waived his right to counsel and entered a plea of guilty, the interpretation on that evidence would not be reviewed on appeal. *Crebs v. Hudspeth*, 160 Kan. 650, 164 P.2d 338 (1945) *Cert. denied* 66 S. Ct. 1348, 328 U.S. 857 90 L. Ed. 1628).

This Court, ruling on an appeal from a Habeas Corpus proceeding which involved the custody of a five-year old

child held that some consideration would be given to the advantaged position of the trial judge and to his findings of fact. It was further stated the judgment would not be disturbed unless it was clearly an error. *Application of Conde*, 10 Ut. 2d 25, 347 P.2d 859 (1959).

In *Allen v. Cranor*, 45 Wash. 2d 25, 272 P.2d 153 (1954) the Supreme Court of the State of Washington reviewed an appeal from a Habeas Corpus proceeding by a prisoner who allegedly plead guilty to a charge of carnal knowledge upon the understanding that the minimum term would be set by the Board of Pardons, when in fact, the Board had no such authority. The court held that on appeal from an order granting the Habeas Corpus Writ it would accept as the facts in the case, the trial court's finding that the petitioner had been deprived of due process.

Likewise in the case before this Court, the trier of the facts found as fact that the respondent was not properly advised on his rights to have counsel appointed and further that the respondent entered his plea of guilty without the advice of counsel and with the reasonable belief that such was necessary to free his wife and prevent her prosecution, and that such plea was not voluntarily entered. (R-12). The respondent, therefore, urges the court to accept the findings entered by the trial judge as the facts controlling on appeal.

A recent Kansas Supreme Court decision, *Finnell v. Patrons Co-operative Bank*, 193 Kan. 354, 394 P.2d 116 (1964), stated:

“Where the trial court’s findings are attacked because of insufficient evidence, the power of a review court begins and ends with a determination of whether there is any substantial evidence to support the findings.

“It is the function of the trier of facts, not the reviewing court to determine which witness and what testimony it should believe.” (Syllabus of the court ¶ 1, 2)

These holdings were applied to a ruling on an appeal from a Habeas Corpus proceeding in *Tipton v. State*, 194 Kan. 705, 402 P.2d 310 (1965).

Evidence was presented through testimony of the respondent and his wife that the respondent entered a plea of guilty upon agreement that the charge against the respondent’s wife would be dismissed (R-43, 69, 70). Although the appellant argues that there was evidence to the contrary, the trial court found in favor of the respondent’s contentions. The respondent submits that this testimony if accepted by the trial court as credible is sufficient to support the court’s finding, conclusions and order. The fact that the trial court, at least in part, chose to disbelieve the contradictory evidence of the appellant’s witnesses cannot of itself furnish the basis to overturn the district court’s decision.

The trier of fact in the instant case, after a full and exhaustive hearing, found sufficient evidence favoring the respondent to support the issuance of a Writ of Habeas Corpus. This court, viewing the record, should be reluctant to disturb the findings of the court below.

On appeal the evidence should be taken more strongly in favor of the order granting petitioner's Writ and any conflicts on the evidence should be resolved in favor of the respondent. *Ex Parte Gutierrez*, 122 Cal. App. 2d 661, 265 P.2d 16 (1954).

When the record of the instant case is viewed in light of the above principles, it becomes clear there is substantial fact and legal basis to support the decision of the trial court.

CONCLUSION

The petitioner was denied due process of law, and this denial was justly and properly corrected by the court below. It is therefore submitted that this court affirm the decision of the trial court.

Respectfully submitted,

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